OCT 21 2002

No. 02-458

IN THE

Supreme Court of the United States

RAYMOND B. YATES, M.D., P.C., Profit Sharing Plan;
RAYMOND B. YATES, Trustee,

Petitioners,

v.

WILLIAM T. HENDON, Trustee,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

JOHN A. WALKER, JR.
Counsel of Record
WALKER & WALKER, P.C.
910 First American Center
P.O. Box 2774
Knoxville, TN 37901
(865) 523-0700

C. MARK TROUTMAN
TROUTMAN & TROUTMAN, P.C.
240 West Central Avenue
Suite 10
P.O. Box 1757
LaFollette, TN 37766
(423) 566-6001

Attorneys for Respondent

176916

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The question presented for review is whether the bankruptcy court correctly held that the Respondent, the Trustee in the bankruptcy case, may avoid and recover a preferential transfer under Sections 547 and 550 of the Bankruptcy Code (11 U.S.C. §§ 547 and 550) from the Defendants/Petitioners. The Defendants/Petitioners, the pension plan and its trustee, are the recipients of the transfer. The debtor, in his individual capacity as a bankruptcy debtor, is not a party to these proceedings.

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STATEMENT OF THE CASE

Introduction

Respondent, William T. Hendon, Trustee, respectfully submits that the Petition for Writ of Certiorari file by the Petitioners do not present compelling reasons justifying review by this Court.

Respondent filed this action seeking to avoid and recover a preferential transfer under Sections 547 and 550 of the Bankruptcy Code (11 U.S.C. §§ 547 and 550) from the Defendants/Petitioners. (Appendix page 23). The bankruptcy debtor was not sued in his individual capacity and the Respondent has not sought in this adversary proceeding to recover from the debtor his interest in the pension plan. The Respondent has simply filed a preference action directly against the pension plan for debt re-payments it received within 90 days of the debtor filing for bankruptcy relief.

The only defense raised by the Petitioners on appeal has related to the claim that the funds were excluded from the debtor's bankruptcy estate, alleging that such funds were in an ERISA-qualified plan. Again, the Respondent is not directly pursuing in this adversary matter a claim against the debtor. Affirming the rulings of the lower courts, the United States Court of Appeals for the Sixth Circuit held that the plan was not an ERISA-qualified plan as to the debtor. *Hendon v. Yates (In re Yates)*, 287 F.3d 521 (6th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002).

In support of their Petition for Writ of Certiorari, the Appellants assert that the Sixth Circuit's decision in *Yates*,

and its decision in *Fugarino v. Hartford Life and Accident Ins. Co.*, 969 F.2d 178 (6th Cir. 1992), conflict "with the decisions of nine other circuit courts" and this Court's decision in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S. Ct. 1344, 117 L. Ed. 581 (1992), asserting the same arguments that they made below. Respondent will address each of these assertions separately.

A. The holding of the Sixth Circuit Court of Appeals Yates does not conflict with the decision of this Court in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S. Ct. 1344, 117 L. Ed. 581 (1992).

Petitioners argue that the Panel's decision in this case and in the *Fugarino* case are inconsistent with the United States Supreme Court's decision in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S. Ct. 1344, 117 L. Ed. 581 (1992).

In *Darden*, the sole issue was whether the claimant was an "employee" or an "independent contractor" as defined under ERISA. In making this determination, the Supreme Court noted that the term "employee" was not specifically defined in ERISA and that courts should look to traditional common law criteria of agency, such as control, in making this determination. *Id.*, at 323.

Unlike the issue before the Court in *Darden*, the issue here relates to Dr. Yates' status as employer or employee. The record before the Court indicates that Dr. Yates is the sole shareholder of Raymond B. Yates, M.D., P.C., a Tennessee professional corporation, albeit inactive at the commencement of the bankruptcy case. (Joint Appendix at page 47). This fact alone indicates that Dr. Yates, as sole

shareholder of the entity, exercised control over its operations and employees. No other facts are contained in this record relating to Dr. Yates' status as an *employee*.

This employer/employee conflict and the application of *Darden* in resolving the definition, was addressed by the court in *Watson v. Proctor, (In re Watson)*, 161 F.3d 593 (9th Cir. 1998), a case cited by the Petitioners. In that case, the court was reviewing the bankrupt's claim to exempt his interest in his pension plan and the bankrupt's status as an employer or employee. The bankrupt was the sole shareholder of his medical corporation. In discussing the applicability of *Darden*, the court stated:

> In *Darden*, the Supreme Court addressed a different issue. Whereas here, the issue is one of a "dual status" employer-employee, in *Darden*, the issue involved the distinction between "employees" and "independent contractors."... In deciding whether Darden could properly be considered Nationwide's "employee" for purposes of ERISA, the Court held that the term "employee" as it appears in ERISA, 29 U.S.C. § 1002(6), incorporates "traditional agency law criteria for identifying master-servant relationships.
>
> The traditional agency criteria can be applied logically only in situations involving relationships between two different persons, i.e., those who employ persons and those who are so employed. Accordingly, *Darden* instructs that we apply the traditional agency definition of "employee" when confronted with the question of whether a specific individual is, in relation to another, an employee

> or an independent contractor for purposes of ERISA. The issue we confront here is different. It is whether a self-employed owner is also his own "employee" for purposes of qualifying his Plan under ERISA. Traditional agency law criteria provide no answer. Thus, we cannot logically apply *Darden* in this case.

Id., at 597. (citations and emphasis omitted).

Likewise, *Darden*, cannot be logically applied to the Petitioners' assertion that although Dr. Yates is the sole owner of his professional corporation, he is nevertheless an employee under ERISA. Accordingly, neither *Fugarino* nor *Yates* conflicts with this Court's decision in *Darden*.

B. The holding of the Sixth Circuit Court of Appeals *Yates* is not in conflict with the decisions of "nine other circuit courts" and does not lead to conflicting results.

As a further basis in support of their argument that this Court should grant the Writ, Petitioners assert that the Sixth Circuit's decision conflicts with the decisions of "nine other circuit courts." However, a careful examination of these cases reveals that such is not the case.

As indicated above, the precise issue herein relates to the status of the bankrupt as employer or employee under ERISA. In construing the language of ERISA and the regulations, particularly 29 C.F.R. § 2510-3.3(c)(1), the Sixth Circuit has held that sole owners or shareholders of employers may not be participants under an ERISA qualified plan. *Agrawal v. Paul Revere Life Insurance Co.*, 205 F.3d 297 (6th Cir. 2000); *Fugarino v. Hartford Life and Accident Ins.*

Co., 969 F.2d 178 (6th Cir. 1992); and *Hendon v. Yates (In re Yates)*, 287 F.3d 521 (6th Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 12550 (6th Cir. June 20, 2002). Many of the decisions of the other circuits cited by the Petitioners as being in direct conflict with these decisions are readily distinguished on their facts.

For instance, some of the cases from the other circuits cited by the Petitioners deal with the issue of whether a particular claimant is a "beneficiary" under a group health benefit plan under ERISA. *See, e.g., Wolk v. Unum Life ins. of America*, 186 F.3d 352 (3d Cir. 1999); and *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001). In each of these cases, the courts held that the claimants were entitled to benefits under the group health plan and were thus beneficiaries of the plan as defined by ERISA. *Wolk*, at 358. ERISA's definition of beneficiary is not as issue herein.

In other instances, the courts were focusing on combined plans or groups of plans. *See, e.g., Slamen v. Paul Revere Life Ins. Co.*, 166 F.3d 1102 (11th Cir. 1999); and *Laventure v. Prudential Ins. Co. of America*, 237 F.3d 1042 (9th Cir. 1998). In those cases, the courts held that a plan not qualifying as an ERISA plan was not converted into a qualifying ERISA plan by either later offering it to other employees or combining it with other qualified plans. *Slamen*, at 1106; and *Laventure*, at 1047.

Other cases deal with the question of whether minority shareholders are "employers" or whether other family members of an owner are "employers." *See, e.g., Leckey v. Stefano*, 263 F.3d 267, 272 (3d Cir. 2001), (holding that a step daughter of an owner was not an "employer"). In *Simpa v. Mass. Cass. Ins. Co.*, 256 F.3d 1006, 1011 (10th Cir. 2001)

and *In re Baker*, 114 F.3d 636, 639 (7th Cir. 1997), these courts held that owners of less than one hundred percent of the stock in the employer were not excluded from ERISA's definition of participant. In fact, the court in *Baker* expressly distinguished instances where the corporation was owned by a single individual, as is case *sub judice*. *Id.*

Finally, in *Watson v. Proctor, (In re Watson)*, 161 F.3d 593, 597 (9th Cir. 1998), the court held that the sole shareholder of the corporation/employer was not an "employee" for purposes of ERISA. Although this case is cited by the Petitioners as being in conflict with the decisions of this circuit, *Watson* actually supports the decisions of this Court.

Respondent does concede that some decisions of other circuits appear to conflict with the decisions of the Sixth Circuit. *See, e.g., Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444 (4th Cir. 1999), and *Vega v. Nat. Life Ins. Services, Inc.*, 188 F.3d 287 (5th Cir. 1999). In these cases, the courts limit the provisions of 29 C.F.R. § 2510-3.3(c)(1) to initial determinations of whether a plan meets the definition of an "employee benefit plan" but apply these definitions no further, an approach espoused by the Petitioner. However, in cases such as this case where the person holds a dual status, such an approach may produce the conflicting result of the same person being an employer in one instance yet an employee in another. The decisions of the Sixth Circuit yield no such result. According, *Yates* should not be reversed and further proceedings herein are not necessary.

C. The holding of the Sixth Circuit Court of Appeals in *Yates* does not conflict with ERISA.

Petitioners also assert that *Yates* conflicts with a plain reading of ERISA. However, as stated by the court in *Watson v. Proctor, (In re Watson)*, 161 F.3d 593, 598 (9th Cir. 1998), "the plain language of ERISA is ambiguous with respect to the classification of a 'dual status' employer/employee." Further, this Court has expressly stated that ERISA's definition of "employee" is "completely circular and explains nothing." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323, 112 S. Ct. 1344, 1348, 117 L. Ed. 581 (1992). Therefore, ERISA's provisions in this regard can hardly be described in terms of "plain language."

What is plain is that 29 C.F.R. § 2510-3.3(c)(1) clearly provides that sole owners of corporate employers are not employees. As set forth above, courts have differed as to the scope of this provision. The approach applied in the Sixth Circuit leads to the appropriate result in these dual status type cases and results in the most consistent application of ERISA.

Further, Respondent submits that it is important to keep the purposes of ERISA in mind. Again as stated by the Court in *Watson:*

> ERISA Title I was adopted by Congress in 1974, in part, to remedy abuses by employers who manage pension plans assets held in trust for workers in traditional employer-employee relationships. Congress recognized that workers, i.e., traditional "employees" are vulnerable to abuse by employers because employers typically

> maintain exclusive control over the pension funds of their employees. In contrast, a self-employed individual such as Watson, has complete control over the amount, investment and form of the fund because he voluntarily creates and manages it for his own retirement. Congress had no reason to extend ERISA coverage to self-employed owners such as Watson. Self interests provides adequate protection. Therefore, it was reasonable for the Department of Labor to exclude self-employed sole shareholders from its definition of "employees" for purposes of ERISA.

Id., at 598.

Examples of such possibilities for abuse are present in the case at hand. The plan here limits the availability of loans and provides that any loans must be for a period of less than 5 years. (Appendix at page 148). The plan further requires repayments by payroll deductions made at lease quarterly. (Id.). Contrary to such plan requirements, the loan to the debtor was outstanding from 1989 until November of 1996. (Appendix at page 448). During that time, no payments were made. (Appendix at page 54 and at page 448-449). Shortly before the commencement of this bankruptcy case, in excess of $50,467.00 is repaid to the pension plan. Clearly, the debtor's actions in total disregard of the limitations contained in the plan evidence the kinds of potential abuses discussed above. The debtor should not be permitted to withdraw funds from his "plan," treat them as his own for years without the requirement of making payments in violation of the plan, and then after repayment and the commencement of a bankruptcy case assert that he was subject to the restrictions of an ERISA qualified plan.

D. The result of *Yates* can be affirmed on other grounds.

Finally, the avoidance and recovery of the preferential transfers can be affirmed on other grounds.

Again, it is important to consider the nature of this case. This is *not* a case by a bankruptcy trustee seeking to recover from an *individual debtor* an interest that debtor owned in a pension plan. This *is* an action by the trustee against a third party, (the Plan) seeking to recover preferential transfers made in repayment of an antecedent debt on the eve of bankruptcy. Consequently, the Respondent submits that this case can be resolved without an examination as to whether *the debtor's interest* in the Plan is excluded from the bankruptcy estate for whatever reason.

ERISA, particularly 29 U.S.C. § 1144(d) provides "[N]othing in this title shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . ." The plain language of this provision indicates that ERISA was not intended to supersede other federal law. Lower courts and commentators considering this provision have found that the clear language of ERISA does not usurp the avoidance powers of a trustee set forth in Section 547 of the Bankruptcy Code. *See, e.g., Pulaski Highway Express, Inc. v. Central State Southeast and Southwest Areas Health and Welfare and Pension Funds, (In re Pulaski Highway Express, Inc.)*, 41 B.R. 305 (M.D. Tenn. 1984); *Lavergne v. Central State Southeast and Southwest Areas Health and Welfare and Pension Funds (In re Ottawa Carthage, Inc.)*, 55 B.R. 371 (D.C.N.D. Ill. 1985); and *Norton Bankruptcy Law and Practice*, Second Ed., Section 156.12, Pages 156-40 through 156-47.

Therefore, even if the debtor's interest in this plan did qualify for the protections of ERISA, the Respondent could nevertheless recover on his claim against the pension plan. Accordingly, the decisions of the lower courts can be affirmed on other grounds and the Writ for Certiorari should not issue.

CONCLUSION

For the reasons cited herein, the Respondent respectfully requests the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

JOHN A. WALKER, JR.
Counsel of Record
WALKER & WALKER, P.C.
910 First American Center
P.O. Box 2774
Knoxville, TN 37901
(865) 523-0700

C. MARK TROUTMAN
TROUTMAN & TROUTMAN, P.C.
240 West Central Avenue
Suite 10
P.O. Box 1757
LaFollette, TN 37766
(423) 566-6001

Attorneys for Respondent